

HOW WE OUGHT TO JUSTIFY HUMAN RIGHTS

The idea of plural justification and an account of Islamic grounds
for human rights



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1 Introduction: the difficulties of universality

At the very least, human rights theory can be considered as a type of both moral and political theory. Proponents of human rights claim that there is a level beneath which no human life should be allowed to descend and that human rights protect the interests that constitute that basic level. The duty to protect these rights is said to fall primarily upon states, and thus in many ways, human rights are proposed as constraints on the actions of sovereign states in the international arena. It is in this sense that human rights is very much a normative political doctrine, as it claims to compel all states towards certain actions, namely the observance of human rights principles. Of course, since all normative political theory (as opposed to descriptive political theory) claims to prescribe how we *ought* to organize our polities, human rights necessarily falls under the larger umbrella of moral theory as well.

Inherent to the idea of human rights is the notion of universality; *all* human beings are said to possess these rights. While it may seem an obvious point, it is important to pause and acknowledge the idea of universality. When we say human rights are universal, we are not saying that all people in the world currently enjoy the rights listed in the Declaration; entitlement is something much different from enjoyment and it is clear that human rights violations occur everyday, without any remedy in sight. So what we are saying in this instance, is that all people in the world *ought* to enjoy these rights, and that everyone, and particularly state actors, *ought to refrain* from violating them as well. Thus, human rights propose universal *constraints* on human freedom. We are free to act as we wish, but only up to a certain point- the point where our actions would violate some human rights principle.

So while casual contemplation may lead us to associate human rights with ideas like freedom, liberty, and autonomy, it is important that we understand the way in which human rights act as constraints and limits upon human action. This is in fact how all moral claims

act; by telling us how we ought to behave, they eliminate certain options from our choosing. But proposing these kinds, and any kinds of restraints on human action require justification. The necessity of human rights is not self-evident.

The issue of justification is particularly relevant to the idea of human rights as a political doctrine. Political doctrines are put forth as models to base our laws upon, and laws *do* restrict our freedom in very real ways, with very real consequences if broken. The punitive measures that most always accompany law introduce an element of coercion into the picture, particularly for those who do not agree with a given law. If we are unable to attain universal consent (which seems to always be the case), then we will need some way to justify our coercion, in this instance, our coercion of those who don't find human rights to be justified. But justification of some particular political theory is no easy task, *especially* when that political theory is universal in character, as is human rights.

We live in an astoundingly plural world. Among other things, this plurality is reflected in the various ways we answer the fundamental questions of life- questions about human nature, God, rationality, goodness, righteousness, purpose, morality, and so on. The seemingly permanent diversity of our existence makes justifying common political principles extremely tricky. How can we be sure we aren't just imposing our particular answers to these questions upon others, in a sense, creating "false universals" as Edward Said called them?¹ This concern is amplified when considered against the backdrop of history, both distant and recent. Human history is one of domination, oppression, and persecution. Both ancient imperialism and modern colonialism seem to have been largely predicated upon ideas of righteousness and goodness. In some sense history teaches us to be wary of universality.

So as is the case with any political theory that has been transformed into political reality, the *legitimacy* of human rights will turn upon our ability to justify them. The problem this

¹ See Said (1979)

thesis looks to resolve--or perhaps better put, investigate--is the problem of justifying a singular political morality in a decidedly plural world. How can we as human beings living in a permanently plural world, justify a set of norms to be binding across all cultures and traditions? In particular, how can we do this in a way that is *not* simply some form of imperialism in which the strong impose their preferred political conception upon the weak? How can we ensure that our political arrangements do not arbitrarily alienate certain groups of citizens? In what way can we consider the idea of human rights to be legitimate?

1.1 The ideas of overlapping consensus and plural justification

John Rawls attempts to answer similar questions in his *Political Liberalism*.² The solution that he offers is termed an “overlapping consensus”, and it is this idea that is the primary inspiration for this paper.³ Fundamental to Rawls’ theory is the idea that there exist, at any given time in one polity, a plurality of what he calls “reasonable comprehensive doctrines.”⁴ These doctrines simultaneously adhere to varied and perhaps even conflicting conceptions of “the good” vis-à-vis human existence. Adherents to such doctrines may variously refer to themselves as Christians, Muslims, Scientologists, Secular Humanists, Marxists, Liberals, and so forth. The dilemma of the modern day nation-state, or so it seems, is that it can only promote *one* of these comprehensive doctrines as the basis of justice. The question is, which one should it be?

Posing the question in this fashion however, is precisely the wrong way to go about deciding upon fundamental political principles: “the question the dominant tradition has tried to answer has no answer: no comprehensive doctrine is appropriate as a political conception for a constitutional regime.”⁵ This claim hinges on two points, the first being

² See Rawls (2005). Rawls of course, uses a *national* polity as the subject of his investigation. Therefore the norms that he focuses on are *constitutional* norms.

³ See Rawls (2005) pp. 133-172

⁴ Rawls (2005) pp. 58-66

⁵ Rawls (2005) p. 135

the idea that the many comprehensive doctrines that color our society are *reasonable*, meaning that they are “compatible with the full rationality of human persons.”⁶ The idea is that even under optimal conditions of discourse, human beings will necessarily still come to disagree on the many fundamental questions of life- questions about reality, nature, God, goodness, and rightness.

The second point that is essential to Rawls’ claim concerns the legitimacy of the government’s monopoly on the use of coercive power. If the government is supposed to represent the citizens as a collective body, then we should expect that the constitutional principles put forth by the government be of the kind that “all citizens as free and equal may *reasonably* be expected to endorse in the light of principles and ideals acceptable to their common human reason.” (emphasis added)⁷ While the total meaning of the term “reasonably” in this quotation may not be fully self-evident, we can grasp at least one of its implications by referring back to Rawls’ first point (about reasonable comprehensive doctrines). People will *reasonably* arrive at numerous competing worldviews. Therefore, if *one* of these worldviews is promoted as *the* political conception of justice, then a number of people will be forced to adhere to political arrangements that they *reasonably reject*. For Rawls, such a consequence is fundamentally unjust, and is an illegitimate use of political power.⁸

The way out of this dilemma then, is to reject the idea that a particular comprehensive doctrine can be utilized as a political conception of justice, and embrace some “freestanding” conception of justice.⁹ By referring to it as freestanding, Rawls has in mind a political conception of justice that does not *require* adherence to some particular religious or philosophical worldview. Indeed, in order to be legitimate, the freestanding conception of justice must be such that all reasonable citizens can be expected to endorse it. In this

⁶ Rawls (2005) p. 135

⁷ Rawls (2005) p. 137

⁸ Rawls (2005) p. 137

⁹ Rawls (2005) pp. 10-12

sense, it is necessary that “the reasonable doctrines endorse the political conception, *each from its own point of view*.” (emphasis added)¹⁰ When this occurs--when some constitutional principles have been proposed that members of all the various worldviews can support from internally solid grounds--then the “overlapping consensus” has been achieved.

In responding to questions about the legitimacy of human rights and about the claims to universality that human rights doctrine asserts, I submit that it is necessary to formulate an understanding of human rights as a possible focus of an overlapping consensus. . While the subject matter of Rawls’ investigation is constitutional principles in a national polity, we can see that the issues and dynamics that he is fundamentally concerned with also apply to the internationalization of human rights principles. In our endorsement of a set of fundamental political principles that ought to govern the behavior of all states (and consequently individuals), we should envision human rights as a set of norms that can function as freestanding principles, capable of being the focus of an overlapping consensus by the world’s varied religious and philosophical doctrines.

Hopefully, conceiving of human rights in this way appears immediately intuitive to the reader. It should be fairly clear that human rights is not a comprehensive moral theory. It does not tell us when (or if) it is okay to lie, or break our promises, or cheat on our spouses. In fact, it seems that human rights is silent on the majority of moral questions. Further, as a political theory, human rights is not comprehensive in scope either. It does not tell us how we ought to structure our legislative or judicial bodies, organize our armed forces, or arrange our nations administratively.

A quick note on terminology: I will in this paper, follow the lead of Tore Lindholm and use the term *plural justification* rather than *overlapping consensus*, as I think this term more

¹⁰ Rawls (2005) p. 134

clearly represents the spirit of the theory.¹¹ This is because, as was mentioned, Rawls' motivations in *Political Liberalism* are clearly related to the question of *political legitimacy* and how this is dependent upon the *public justification* of political principles. For Rawls, political legitimacy requires that constitutional norms be justified in a way that does not systematically alienate certain groups of citizens. In short, the idea of justification is central to the theory of an overlapping consensus and so I find the term "plural justification" to be a more straightforward "label."

It is important to mention Lindholm's work of course, not just because he has helped to improve the terminology associated with these ideas, but because he has gone such a long way in fleshing out and explicating how we ought to understand the idea of plural justification of human rights.¹² Indeed, he has addressed the idea of plural justification for human rights in a most thorough fashion. Nonetheless, the theoretical discourse surrounding the intersection of human rights and "democracy" with "tradition", "culture" and "religion" is certainly showing no signs of letting up, and many of the insights provided by the idea of plural justification of human rights are still going unnoticed or in some ways misunderstood.¹³ While certainly drawing upon Lindholm's work in this paper, I hope to provide a fresh perspective on the theoretical issues involved, emphasizing and reformulating the ideas that I find to be of most importance. Perhaps, if things go really well, I can offer a few insights that will add something new to the discussion.

¹¹ See e.g. Lindholm (2008). Lindholm also uses the term "overlapping justifications" which also seems to be fine. Which term is used is of course not nearly important as the quality of the theory itself, but I think it is useful to discard the word "consensus" from the picture, as this can create problems when it becomes entangled with the idea of justification.

¹² See Lindholm (1992), (2004), (2005) & (2008)

¹³ See e.g. Sachedina (2007). Sachedina seems to fail to differentiate between the UDHR and "anti-religious" (for lack of a better word) justifications of human rights that have been needlessly attached to it.

1.2 Islam: the implications of the discussion

Interestingly enough, the introduction I have given thus far only applies to the first half of the paper. The idea of plural justification of human rights will certainly be relevant to the second half of the paper, but strictly speaking, the substantial explication and discussion of the theory *itself* will take place in the first half. The second half of the paper will attempt to outline an account of substantive justifications for human rights from the perspective of one specific “comprehensive doctrine”- Islam. To be more specific, I will focus on the work of one Islamic scholar--Dr. Khaled Abou El Fadl--and try to piece together an account of Islamic justifications for human rights from a selection of his writings. The “compatibility” of Islam and human rights is at the present time an obviously popular topic, and I have decided to write on it for that very reason. However it’s important to be clear that I have not chosen Islam simply because it is a hot topic, but rather because of the *reasons why* it is such a hot topic, which point to the larger issues at stake in the discussion. Specifically, how we understand and address the discussion on Islam and human rights carries with it myriad implications for how we ought to view the idea of secularism in the 21st century. What exactly does secularism require? How ought citizens in plural societies justify their political views to one another? What does something like “separation of church and state” really mean? How should devout religious people deal with the growing power of global human rights norms? These questions, and many more, are implicitly answered when we weigh in on the question of Islam and human rights, so it is extremely important that we do so armed with the proper intellectual tools.

I won’t have enough space to offer answers that do justice to the many important questions that arise when we consider the intersection of religion and human rights. Nonetheless, I hope to at least offer some preliminary insights into the way in which the idea of plural justification of human rights ought to orient our approach to such matters. In this way, the second half of the paper, while focusing on Islam, addresses a set of larger questions pertaining to religion (or culture, or tradition, or whatever other term is fashionable), as it gives us an illustration of the idea of plural justification at work and specifically

addresses secularist fears about the compatibility of religion and human rights.¹⁴ This however, is not to overlook the more conspicuous result of this part of the paper, which will be to respond to critics of Islam by pulling together and articulating a reasonable account of Islamic justifications for human rights. With that said, I will begin now with the idea of justification and its relevance to human rights.

¹⁴ Of course, it may seem strange to offer only one account of human rights, and claim this illustrates a “plurality” of justifications! But I do so because I assume that many human rights advocates in the West find themselves comfortable assuming the congruence of (some kind of) secularism and human rights. At the same time I recognize that there is no hegemonic account of the justifications for human rights in the West. For the argument that human right necessarily rely on *religious* premises, see Perry (1998).

2 The argument for plural justification of human rights

When people make exceptionalist or relativist arguments and claim to be exempted from the demands of human rights, these people are attacking the theoretical justifications of human rights. Essentially, they are saying that human rights are not sufficiently justified to warrant universal adherence. Proponents of human rights will want to reply by demonstrating that human rights are indeed justified in some way that leaves such exceptionalist claims defeated. The immediate questions posed here are questions such as: Where do human rights come from? Are human rights truly universal? In what sense do human rights exist, and how can we prove it? And so on. Our answers to these questions matter because of the immense importance ascribed to human rights. Human rights are positioned as principles that outweigh competing claims about “what is good.”¹⁵ Ronald Dworkin has famously referred to human rights as “trumps,”¹⁶ in the sense that they act as trump cards, almost always beating out conflicting norms. Consequently this means that if we are to endorse human rights, then we commit ourselves to the notion that if necessary we will be willing to subjugate our other normative beliefs to human rights, even if those are deeply held moral principles. Clearly, to accord human rights this kind of power requires that we be thoroughly convinced of their virtue; human rights require strong justifications. The big question is then, what *are* the justifications for human rights?

2.1 The inherent and equal dignity of all human beings

A logical starting point in an attempt to answer this question would seem to be the Universal Declaration of Human Rights. The Preamble of the Declaration proclaims that the “recognition of the inherent dignity and of the equal and inalienable rights of all

¹⁵ It’s important to emphasize that human rights claim to outweigh *only* competing claims of what is good, that is, claims that would honor some other “good” *instead of* human rights if a conflict of goods were to arise. Human rights say nothing about their own relationship to goods that raise no issues of conflict. This idea will be fleshed out below.

¹⁶ See Dworkin (1977)

members of the human family is the foundation of freedom, justice and peace in the world.” Similarly, Article 1 declares that “All human beings are born free and equal in dignity and rights.” Both of these passages indicate a link being drawn between the inherent and equal dignity of all human beings, and the rights enumerated in the Declaration. But this idea of inherent and equal dignity is for the most part, as much as the Declaration will give us in terms of a grounding of human rights.

The idea of dignity is surely a powerful construct that offers a strong base from which to build a justificational framework, but it is clear that no such framework is entailed by the idea of dignity alone. Dignity is an uncertain term, and because of this, human rights advocates must address at least two issues if they are to use it as a foundation. First, it is simply not self-evident that people possess rights because they possess dignity.¹⁷ Consequently, the task of any foundational scheme of human rights is to bring to light exactly how one ought to understand the idea of human rights as it relates to human dignity. In short, how do we go from dignity to rights?

The second issue that needs to be addressed is the origin of dignity. The Declaration fails to announce exactly *where* human dignity comes from. Perhaps God? Or Nature? Reason? The consideration and ultimate rejection of such origins by the drafters means that the business of determining some such source has also been left to human rights advocates. But that the Declaration simultaneously offers a normative foundation (dignity) and fails to situate that norm amidst a larger ontological framework, should not be viewed as some sort of failure. Indeed, the foundational restraint employed on the part of the drafters is clearly one of the shining achievements of the Declaration.¹⁸ In considering the absence of “complete” grounds for human rights in the Declaration, we should recognize that the idea of inherent and equal dignity is certainly *something*. It seems to be an idea that *any* future justificatory scheme will need to engage, but nonetheless it is a normative concept that is

¹⁷ Lindholm (2004) p. 48

¹⁸ On this point see Lindholm (1999)

vague enough that the varied and diverse peoples of the world can clarify its relation to rights *as they see fit and in accordance with their comprehensive worldviews*.

That the Declaration does not force some picture of God or Nature upon us is an impressive feat, and the lack of some specific justificatory account within the Declaration opens the idea of human rights up to a plurality of possible justifications. We could argue that human rights come from God, and this would not contradict anything in the Declaration.

Similarly, the Declaration does not deter us from arguing that human rights are a necessary consequence of the Reason of humanity. Examples abound. But that the Declaration is amenable to a variety of justificatory schemes of human rights does not fully answer our initial question, which asked, “What *are* the justifications for human rights?” The Declaration gives us a partial answer; it gives us the guiding principle of inherent and equal dignity. But as for the larger theories that fill in the rest of the puzzle, so to speak, we are still left wondering, which is best? In considering this question, I think it will be useful if we first consider the traditional ways in which human rights are justified.

2.2 Natural law justifications of human rights

Traditional justifications of human rights have most often posited these rights as the consequence of some form of natural law.¹⁹ Natural law conceptions of human rights tell us that human rights exist prior to and independent of their legislation in international and national law. Human rights represent objective moral truths that we are charged with discovering and implementing. Of utmost importance to any natural law system, are the foundations from which that system arises- the actual *source* of those laws. Typical sources cited include things like God, Nature, and Reason. These metaphysical entities serve as powerful justifications for the moral claims represented by natural law systems.

¹⁹ I overlook the positivist conception of human rights here, so as to save space, but also because I think it is unnecessary in the face of my initial assumption that human rights are moral rights. I do not doubt that we should *also* conceive of human rights as legal rights, as long as this not would eliminate our ability to conceive of them as moral rights as well.

Connecting human rights to ultimate entities like God and Nature gives human rights the transcendent quality that we typically associate with universality, particularly its connection to inalienability.²⁰

But while rooting human rights in strong metaphysical claims seems to be necessary to create an accurate conception of universality, it is also the main reason why relativist and exceptionalist arguments are able to persist. Metaphysical claims about the nature of God, or what Reason dictates, are highly contentious and we can often be left feeling that they are in some sense impossible to “prove.” Further, that some people don’t believe in God, or don’t believe in some set of abstract laws of Nature, doesn’t seem to be so outrageous. The big problem with natural law theories of human rights is not that they seek to relate human rights to larger metaphysical claims, but that they are often posited in an “all-or-none” type of fashion, so that their inability to wash away even the slightest grain of doubt seems to demonstrate some kind of failure. This has nothing to do with the quality of our theories, and everything to do with the terms of the debate. Objectors to human rights--be they relativists, skeptics, exceptionalists or anything else--are able to sustain their positions largely due to the immense demands they make of human rights theorists. The absence of some indisputable say-all end-all theory serves to maintain the persistence of these objections.

What I want to argue is that an adequate theory of human rights will have to confront this issue, and alter the terms of the discussion so that we can come to accept the fact that *it is neither possible nor desirable to construct one authoritative theory of human rights*. An adequate theory of human rights will necessarily allow for a plurality of *competing* justifications. This is a fairly large claim and it will be important that we understand what is and isn’t implied by the promotion of plural justification of human rights.

²⁰ Ulrich (2001) p. 203

2.3 The independence of truth and justification

Many of us like to have faith in the notion of truth and that it does indeed exist; some things can be true and others false. Perhaps we hold some of our beliefs about the world to be true, and others we are not so sure of. But that we know some limited number of truths gives us the feeling that in general, truth is accessible and that while discovering it may not be an easy task, with enough intellectual hard work we can uncover enough of it to piece together substantive and coherent worldviews that do a fairly good job of representing truth. There is also a feeling that the natural path of reason leads towards truth, and that this truth is some singular thing.

When two parties disagree about human nature or God, we don't feel comfortable saying that they are both correct, especially if the two sides present mutually exclusive arguments. So in regards to human rights and their justifications, it seems that some account is right and others wrong, or at the very least some accounts are closer to the truth than others. It seems that accepting a plurality of justifications necessarily means that we will be accepting some that are false. If we want to believe that truth is singular, and that indeed there will only be one true account of the justifications of human rights, then don't we *have* to reject the notion of plural justification? Or better yet, if we do accept a plurality of competing justifications, then do we not commit ourselves to some kind of relativism? Isn't endorsing plural justification just a convenient (and perhaps lazy) way of avoiding the difficult task of finding the truth?

These types of questions are certainly valid and important questions. The apprehension that they exhibit towards the idea of plural justification is an apprehension about how the concept of truth gets treated through all of this. Fortunately, once we clarify the different ways in which the notions of truth and justification function, we can settle any fears we might have about the integrity of moral truth in a plural justificatory scheme. I will begin

by outlining the notion of what Jeffrey Stout has called a “contextualist account of justification.”²¹

2.4 The contextual account of justification

The starting point for Stout is the idea that “being justified in believing something is a relation among a person, a proposition, and an epistemic context.”²² Epistemic contexts will vary across cultures and even from person to person. Because contexts will vary, we can see that different people can be justified in holding different beliefs, even contradictory beliefs. Consider theories of the relationship between the movement of the sun and earth. In Europe a thousand years ago, it was commonly held that the sun rotated around the earth. This was a perfectly justified belief, given the evidence available to people. But when Copernicus arrives in the early 16th century and delivers a convincing scientific account that the earth orbits the sun, the evidence begins to change. Now in the 21st century, if someone were to hold the position that the sun rotates around the earth *even after being presented evidence to the contrary*, we would have a tough time saying that person was justified in his or her belief. A more straightforward example: suppose I tell you that I like pizza even though I don’t. You are perfectly justified in believing that I like pizza, even though it’s not true. The lie that I have told you creates a context wherein it is justified for you to believe a falsehood.

So we can see that because epistemic contexts can change, we can be justified in holding false beliefs, including moral beliefs. Similarly, we can justify our belief in certain truths *by way of false premises*. Suppose I told you that I didn’t like pizza because I am allergic to cheese. But perhaps some time passes and you mix things up a bit. Now you recall that I am allergic to tomatoes, and therefore I don’t like pizza. In this case you are perfectly justified in believing a truth (that I don’t like pizza), based upon a false premise (my allergy to tomatoes).

²¹ Stout (1993)

²² Stout (1993) p. 220

The point here is that truth and justification are distinct concepts, and they function with a certain amount of independence from each other. This point however, while important, doesn't directly respond to worries we might have about how the concept of moral truth gets treated in a plural justificatory scheme. It doesn't answer foundationalist claims that if truths about human nature, rationality, goodness, and morality do indeed exist, *then we ought to pursue those truths and nothing short of them*. To apprehend how different parties can accept and endorse competing and exclusive justifications of human rights without compromising their own specific claims to truth, we need to keep in mind the point just made regarding the independence of truth and justification, and also keep a clear grasp of two more points: 1) what kind of process we are engaging in when we attempt to justify something, and 2) the fact of reasonable plurality. I will begin with the first item.

What are we doing when we try to justify something? Stout says that when we justify a belief, we aim to *remove relevant doubts* regarding that belief.²³ Which doubts we consider to be relevant will of course depend on *whom we are directing our justification towards*. What this means is that certain justifications are directed towards certain *audiences*.²⁴ If we are trying to justify a moral belief to multiple audiences, we may need to formulate multiple justifications for the same proposition. But how do we decide who is and isn't part of a certain audience? Aren't we all as rational human beings, part of the same audience in at least some broad sense?

Traditionally in moral theory, it seems that all human beings have been considered to be part of the same audience. We have been searching for a comprehensive account of some universal morality forever. Consider human rights. When people raise objections to the universal validity of human rights, proponents of human rights will want to reply by pointing out the argumentative flaws in these objections. The human rights advocate will

²³ Stout (1993) p. 223

²⁴ Stout (1993) p. 223

want to show what is “wrong” with the protester’s line of thinking, thus steering him or her in the direction of the “right” way of thinking about human rights. The inference is that there is some correct way of thinking about human rights, which if taken up, will demonstrate universal validity. The idea is that there is some universal set of justifications that applies to the whole of humanity *as one audience*. This is a common method of justifying moralities. This proper way of thinking about morality is often alternately described as “impartial,” “ahistorical,” or “objective.” James Fishkin describes this position as a claim “[t]hat one’s judgments are *objectively valid*, i.e., that their consistent application to everyone is supported by considerations that anyone should accept, were the issue viewed from what is deemed to be the appropriate moral perspective.”²⁵ Under this approach, the notion of an “appropriate moral perspective” is crucial to the justification of moral norms. The idea is that moral knowledge is not bound to any specific historical or cultural perspective, but rather, it is anchored in an objective and ahistorical foundation that provides us with universal norms that are immediately justified.

Stout’s contextual account of justification tells us that this type of foundationalist approach fails and will continue to fail because it doesn’t understand the concept of justification properly. Foundationalist approaches to justification are explicit in their aim to remove themselves from specific contexts. But the act of justification is an act that is *necessarily* dependent on context. This is because, as Stout says:

Justifications are answers to why-questions of a certain sort. As such, they are dependent on context for three reasons: first, because conversational context determines the question to which a justification counts as an answer and thus the sort of information being requested; second, because conversational context determines a justification’s audience; and third, because a justification’s success can be appraised only in relation to the epistemic context of its audience, including its relevant reasons for doubting and the propositions its members are justified in believing.²⁶

²⁵ Fishkin (1986) p. 210

²⁶ Stout (1993) p. 224

So, when we take part in justification, we are trying to answer specific questions about our theory. If that is the case, then we need to know *who* is asking the question, *what* is being asked, and *what kind of answers* have a chance at being successful. Essentially, when some foundationalist moral theory is presented, its author has purported to identify the *only* relevant questions that *everyone* could ask of her theory. The theory then, is a response to those specific questions.

In essence, the foundationalist may agree with me that context does matter in justification, but that with respect to moral truth there exists a “context” that applies universally. Often the idea of a universal context is delineated by the notion of rationality, so we get theorists who claim to be addressing their arguments to all rational people. But if foundationalists are going to claim to be addressing all rational people with their moral theories, then it will be extremely important that they aren’t mistaken in where they draw the line between rational and irrational. This is an extremely difficult task, which I think can be illustrated by considering how one contemporary human rights theorist, Alan Gewirth, justifies human rights.

2.4.1 Alan Gewirth’s proof of human rights

Gewirth claims that for any person who wishes to pursue a set of interests (which by definition is everybody), action is a necessary precursor. To pursue our interests, we need to be able to act in a way that expresses that pursuit. He claims that the logical precursors to action are the principles of freedom and well-being; action is not possible without these two goods. As *necessary* goods, freedom and well-being automatically become things that we *ought* to have if we don’t have them.²⁷ As “purposive agents”, we are committed to the idea that we have rights to freedom and well-being. Since all people are purposive agents, it follows that as individuals we must endorse the idea that all people have these rights. From there, Gewirth suggests that the general rights to freedom and well-being are

²⁷ Gewirth (1982) p. 47

composed of a larger group of more specific substantive rights, perhaps not much different than the list found in the UDHR.²⁸

This is obviously an overly simplistic account of Gewirth's proof, but it suffices because the main point I want to emphasize is Gewirth's insistence that human rights are *logically necessary*. Anybody who doesn't commit themselves to human rights has contradicted logic; they have acted irrationally. So, if Gewirth is correct, then the only people who will disagree with his proof are irrational people whom fortunately we don't need to worry about, since we are only concerned with justifying human rights to rational people who "play by the rules." But it seems to me that a perfectly reasonable person could take issue with many of the assumptions of Gewirth's model. The move from the *goods* of freedom and well-being to a list of *rights* seems to be questionable, at least in some minimal sense. Perhaps freedom and well being can be protected by some mechanisms other than rights. It's certainly not self-evident that such a move is necessary, and it seems plausible that a perfectly reasonable person could question the specific list of rights that Gewirth ends at. It's certainly a compelling argument, but his moves are clearly made out of something other than deductive necessity.

The point is that Gewirth implicitly claims to be directing his justifications of human rights to a *universal* audience. But the concepts he employs and the mode of reasoning he uses to connect those concepts are not accessible to all reasonable people. How can a religious person who rejects the notion of Free Will engage this model? Consider a religious person who holds moral beliefs contrary to human rights and holds those beliefs as representative of God's will. Gewirth is telling this person that he is logically required to disobey God's will!²⁹ A human rights advocate will certainly want to engage these beliefs, but is appealing to "the requirements of logic" the best way to do that? Think about the nature of the objections that this religious person might raise. They will have to do with theology,

²⁸ Gewirth (1982) pp. 59-67

²⁹ Freeman (2004) p. 394

faith, and sacred text interpretation; they will introduce issues that Gewirth's theory is simply unequipped to address. In this sense Gewirth's justifications are aimed only towards a limited audience.

If we imagine a conversation between Gewirth and this hypothetical religious person, it is easy to envision a discussion in which the two sides are simply talking past each other. Gewirth's theory does not comment on Christian or Jewish theology. It has nothing to say about Islamic *Shari'ah*. The example serves to illustrate the fact that our respective "moral languages" are built upon more than just ideas of right and wrong. They spring from metaphysical and epistemological commitments that are deeply rooted in historical tradition.

My aim here is not to imply that Gewirth's theory would be wholly unintelligible to some religious person. The idea is not that our moral languages are untranslatable across cultures. The point is simply that for some religious people Gewirth's proof will be an inadequate justification of human rights because it ignores the most important pieces of the puzzle, in terms of how they make sense of and understand the world. Going back to the idea of justification as "removing relevant doubts," we can see that Gewirth's theory does not go very far in removing the Muslim's doubt that the Qur'an calls for inequality between men and women. It simply doesn't possess the tools to engage such doubts. The contextual account of justification tells us that such objections need to be answered in a similar language to the one in which they are posed. In the example I have used, we are talking about religious hermeneutics first and foremost.

The foundationalist may at this point have an objection. Perhaps she will agree that some single account will never be able convince all people of the merit of human rights. But this, she may claim, is similarly true of any plurality of justifications, since some people will simply never endorse human rights. Despots, bigots, racists, and other generally unreasonable people will always reject human rights, and so we ought not compromise our moral theory on their account. We ought to pursue the one and only coherent justification

of human rights, and when it is discovered, those who remain unswayed by it can simply be branded unreasonable and their objections discarded.

In response, I should make clear that I don't mean to claim that plural justification of human rights can solve the problem of vicious and malevolent people. Sure, human rights may never gain the allegiance of all people in the world. But if we are going to claim that such people should be *morally criticized* for their (anti-human rights) beliefs, then we need to be careful whom we include in this group. Should people be morally criticized for not agreeing that human agency and logic alone necessitate human rights? Similarly, should Christians criticize others for not endorsing human rights via the teachings of Jesus Christ? I think not. It's very possible that there exists a generally reasonable and well thought out justification of human rights *that will nonetheless be rejected by reasonable people*. The point here is that unreasonable people are not the only cause of disagreement in politics. Disagreement can and does occur between reasonable and cooperative people, and it is this idea that I turn to now.

2.5 Reasonable Disagreement

Often times when foreign leaders raise objections to human rights, we are told that these politicians are merely acting out of a sense of self-preservation. Appeals to cultural relativism are used "as a way to attempt to deflect attention from their repressive policies."³⁰ When political figures make these sorts of objections, their main goal is preservation of power, as opposed to revealing moral truth. This is one way of explaining disagreement. This method of explaining disagreement focuses on the *participants* in the discussion and explains that their behavior or reasoning is to blame. Perhaps they argue out of narrow self-interest, or reason illogically, or simply are not very smart. In short, their inability to participate in a reasonable discussion is the *cause* of the disagreement itself. For the purposes of this paper though, we aren't so concerned with disagreement caused in this way. This is because, as Rawls says, "we always work at first within ideal

³⁰ Donnelly (2003) p. 100

theory.”³¹ First and foremost, we ask the question, “Can people who nonetheless *agree* on the normative value of human rights, reasonably disagree on the justifications of those rights?” In other words, even under ideal conditions where all discussants value human rights, reason to the best of their abilities, and aim to reach agreement- will we nonetheless find disagreement regarding the grounds of human rights? I think we will.

2.5.1 The burdens of judgment

Rawls’ account of the “burdens of judgment” is perhaps the most useful tool we can use in trying to understand how reasonable people can arrive at irreconcilable disagreement. By “reasonable” here, I suppose I have in mind something like Rawls’ articulation of the term as a desire to propose, discuss, and honor fair terms of cooperation and “be fully cooperating members of society.”³² The burdens of judgment, as Rawls says, are “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”³³ The idea is that as humans we are not perfect beings, and that exercising our faculties of reason with regards to moral and political questions is no easy task. Rawls lists six specific burdens of judgment although he admits his list is not exhaustive. The list is worth quoting in full:

- a. The evidence--empirical and scientific--bearing on the case is conflicting and complex, and thus hard to assess and evaluate.
- b. Even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments.
- c. To some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretations) within some range (not sharply specifiable) where reasonable persons may differ.
- d. To some extent (how great we cannot tell) the way we assess evidence and weight moral and political values is shaped by our total experience, our whole

³¹ Rawls (2005) p. 55

³² See Rawls (2005) pp. 48-55

³³ Rawls (2005) p. 56

course of life up to now; and our total experience must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.

e. Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment.

f. Any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized. This is because any system of institutions has, as it were, a limited social space. In being forced to select among cherished values, or when we hold to several and must restrict each in view of the requirements of others, we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer.³⁴

The immediate value of Rawls' ideas here does not lie in whether or not these epistemic conditions he describes actually represent reality (although I am inclined to say they do). More important, is the idea that we have a moral duty to articulate and endorse these burdens of judgment.

The idea of the burdens of judgment takes on a moral character when we ask the question, "How *ought* we explain disagreement?" At first glance this may appear to be a strange question, so I should clarify what *type* of disagreement I refer to. This question does not refer to a specific instance of disagreement over a particular issue, but rather to the *widespread and persistent* disagreement that characterizes plural societies. This type of disagreement covers a wide spectrum of issues, only one of which is the question of the grounds of human rights. The most immediate way to deal with such disagreement is through elimination or suppression of those with opposing views. This of course, is not a legitimate option from a human rights perspective.³⁵ Regardless of how some liberal society decides to adjudicate disagreement in the public sphere, any such society must

³⁴ Rawls (2005) pp. 56-57

³⁵ Grimen (1999) p. 111

possess some way of publicly *understanding and explaining* that disagreement.³⁶ The reason this is necessary is because, as Harald Grimen puts it, “When citizens cannot mutually respect persistent disagreement their political culture cannot be liberal. It lacks mechanisms that enable them to abstain in a justifiable way from eliminating or suppressing opinions or persons with whom they disagree.”³⁷ Beyond this instrumental value, we should also recognize the value of mutual respect of disagreement as a good *in itself*. Citizens cannot claim to recognize each other as possessing inherent and equal dignity if they refuse to respect reasonable disagreement.³⁸ So *how* we explain persistent disagreement matters. Grimen offers an invaluable discussion on this issue. I will try now to quickly outline what I see to be his most valuable point, which is a point about neutrality.

Grimen explains that the overarching requirement we must place on our explanations of disagreement is that they be *relatively neutral*. In order to foster mutual respect of our disagreement on basic religious, moral and political questions, our explanation cannot seem to take the side of one party to the disagreement. An explanation that condemns the reasoning or motives of one of the parties involved is guilty of such bias. When we say that disagreement is caused by someone’s acting out of self-interest, prejudice, bias, or ideological blindness, our explanation easily becomes a part of the dispute.³⁹ The party being accused of such faults will surely reject this explanation, as she will have no reason to suspect that her arguments are respected. Characterizing one participant’s behavior as unreasonable is clearly not a neutral way to explain disagreement.

The reader might now object that sometimes people *do* argue out of prejudice and self-interest, and that we ought to call that what it is- unreasonable. This is fine, I accept this

³⁶ I use the term “liberal society” here as a synonym for a society that respects human rights. Perhaps the congruence of these two ideas is not self-evident, but this is not the time to argue such a point.

³⁷ Grimen (1999) p. 111

³⁸ This point will be better clarified in the discussion below on tolerance.

³⁹ Grimen (1999) p. 116

point. We certainly shouldn't pretend that unreasonable people don't exist. However, the point of this discussion is to explore how we can explain *systematic and persistent* disagreement in a plural society in a way that fosters mutual respect among citizens. If we aim to create an environment where citizens can respect each other, then other ways of explaining disagreement must be made available.

So our public explanations of disagreement can't blame the participants involved, as this is a decidedly biased approach. This is one way to think about the neutrality that we seek. Grimen goes on to explain that another way in which our explanations of disagreement will need to be neutral is that those explanations must not "rely upon too strong normative or epistemic premises", meaning that we should avoid comprehensive theories about the nature of moral or political issues.⁴⁰ So for example, suppose we explain our disagreement using some sort of moral relativism. We say that moral values are relative and that Muslims, Christians, Atheists, and Hindus all adhere to differing value systems. When these groups come together in a plural society, it is no wonder that they cannot come to agreement on many issues, for the value systems of each group are incommensurable with each other. Agreement is impossible. The problem here is that some people may reject a relativism of this kind. Some person might not think that values are incommensurable across religions, and thus the discussion can be brought to an end based on premises that this person expressly rejects.⁴¹ This kind of explanation is exactly what Grimen has in mind when he talks of epistemic premises that are "too strong." Using such premises can easily result in one side feeling that his or her argument has been disrespected.

Keeping these two conceptions of neutrality in mind, Grimen's argument, which I am inclined to agree with, is that the account of the burdens of judgment is the most neutral way to explain disagreement and thus stands as the best method of explanation, in terms of serving as a public basis of mutual respect for disagreement. The burdens of judgment do

⁴⁰ Grimen (1999) p. 117

⁴¹ Grimen (1999) p. 118

not presuppose any defects in the participants reasoning or behavior- everyone involved is assumed to behave reasonably. These burdens exist independent of our reasoning and behavior, and no matter how well we reason, they are simply unavoidable.

The burdens also do not presuppose any strong normative or epistemic premises.⁴² They do of course rest on *some* epistemic assumptions, but these are decidedly weak assumptions. It is certainly possible that someone could object to any one (or all) of the six items in Rawls' list of burdens. In this sense, the burdens are not perfectly neutral. But this is why Grimen uses the phrase "relatively neutral" to describe what we want from our explanation of disagreement. It is doubtful that there even is such a thing as "perfect" neutrality available to us.

Because the burdens satisfy these two requirements of neutrality, they become easily accessible to all citizens, and thus provide a feasible public basis of mutual respect for disagreement. In as much as we *ought* to value the ideal of mutual respect of disagreement, Grimen's points constitute a *moral* argument for our endorsement of the burdens.

It is important now to clarify how this relates to the question of the justification of human rights. The consequences of the burdens of judgment are such that even under ideal conditions of discussion--conditions in which participants behave reasonably and altruistically--we are still bound to arrive at disagreement regarding fundamental philosophical, moral, and political issues. That is to say, in an ideal world where people are free to construct, discuss, revise, and adopt beliefs regarding fundamental metaphysical, epistemic and moral questions, given the limits of the human capability to reason we can expect to find a variety of reasonable positions--*and hence a variety of reasonable justifications for human rights*--that could only be repressed or excluded from public life arbitrarily.⁴³

⁴² Grimen (1999) pp. 121-122.

⁴³ It should be noted of course, that in such an ideal world, we should also expect to find a number of "unreasonable comprehensive doctrines." We do not mind denying these doctrines public legitimacy

Now, it may seem strange to talk about “excluding” certain justificatory accounts of human rights from public life. Isn’t it obvious that a human rights-friendly government would necessarily allow for a plurality of justifications, simply due to its protection of freedom of speech? Isn’t it also obvious that any theorist committed to human rights would also feel compelled to tolerate foundational accounts of human rights with which he disagreed? Both these statements are true indeed. However, these points allow us to clarify exactly what a total commitment to plural justification requires. The argument for plural justification of human rights is not simply a call for toleration. In fact, when pressed, we can see that it calls for a political morality that extends beyond and even criticizes conventional notions of tolerance.

2.6 The limits of tolerance

Traditional conceptions of tolerance advocate an ethic of restraint or noninterference in the lives of others. Individuals ought to exercise restraint *in spite of* the disagreement or disapproval they hold towards other’s words or deeds. From this perspective, the obligations laid upon individuals are largely negative in nature, requiring them to abstain from repressing or stifling others’ “freedom to be different,” so to speak.⁴⁴ The value of such an ethic has certainly been proven over time, but it seems doubtful that the idea of tolerance can adequately guide us in our pursuit of satisfactory justifications of human rights. The reason being, as Lindholm says, is that “at its core toleration constitutes a

precisely because they are unreasonable. From this point, the reader can see that the term reasonable is used here as a distinctly moral concept. What grounds we rely upon for denying certain comprehensive doctrines public legitimacy i.e. labeling such doctrines “unreasonable,” certainly requires principled argument. It’s possible that support for human rights could play a primary role in articulating such grounds. This paper however, is not about constructing a specific justificatory account of human rights, but rather is primarily concerned with how various human rights advocates should deal with the difficult task of agreeing on some specific justification of human rights. It is in this sense that I follow Rawls’ advice and work first in ideal theory.

⁴⁴ Schiffman (2003) pp. 4-15

merely prudential determination to put up with other beliefs.”⁴⁵ This pragmatism, characterized by its conferral of mainly negative obligations upon individuals, can serve to foster an apathy that “subtly emasculates the sympathetic instinct to engage, understand, and ultimately respect others.”⁴⁶ The result is that, while “tolerated,” minority viewpoints can often be hastily discounted or ignored, on account of their attachment to non-dominant traditions. This conception of tolerance seems to be in some ways connected to and supportive of the contemporary liberal trend of calling for the filtering of religious beliefs in the public sphere.⁴⁷ Calls for such filtering essentially tell religious people that tolerance of their beliefs does not equate to taking those beliefs seriously. This kind of staunch secularism is precisely what the idea of plural justification of human rights aims to neutralize.

Fully acknowledging the fact of reasonable disagreement and how this fact will affect our deliberations on the philosophical foundations of human rights requires that we go beyond the minimal requirements of toleration. It demands that we recognize the *fact* that others can and will hold reasonable justifications for human rights that partially or even totally contradict our own understanding of the foundations of human rights, and that those contradictory justifications are indeed *necessary* to the proper grounding of human rights.

So when I talk about the “exclusion” of particular accounts of human rights from the public sphere, what I have in mind is essentially any failure to emphasize the inherent receptibility of human rights to a variety of foundational schemes. The responsibility to refrain from publicly espousing a particular justification of human rights to be the “universal justification” falls on all human rights advocates. We can see though, that this responsibility increases according to the influence and power that individuals or groups may hold, in terms of forming public opinion on human rights. So for example, we should

⁴⁵ Lindholm (2004) p. 45

⁴⁶ Lindholm (2004) p. 45

⁴⁷ See e.g., Habermas (2005)

absolutely expect all United Nations bodies to refrain from endorsing some specific philosophical explanation of human rights. Similarly, we should hope that national governments would also abstain from singling out some specific foundational account as the only legitimate theory. It is also important that authoritative institutions such as universities and religious authorities exercise this type of restraint.

It may at this point begin to feel as if the requirements of advocating plural justification of human rights are so demanding that they incapacitate our ability to form and advocate actual justifications for human rights. It may seem that in an effort to accommodate a range of moral foundations, the door has been left too far open and relativism or perhaps skepticism, if they haven't already, will soon creep into our theory.⁴⁸ Haven't I just claimed that no person or group ought to claim that his or her favored justification of human rights is true? Doesn't this mean that I am advocating a theory that either claims that all justifications of human rights are either simultaneously true, or simultaneously "unprovable"?

2.7 Skepticism, relativism and fallibilism

To respond to these questions it is important that we now recall the discussion on truth and justification, and the clarification of the fact that truth and justification function independent of each other. That someone holds a justified belief does not make that belief true. The idea of reasonable disagreement as explained via the burdens of judgment does not presume a different functional relationship between truth and justification. The key consideration introduced by the account of reasonable disagreement is that people can have *good reasons* to believe things that we find to be false. Recognition of the burdens of judgment does not contradict a claim that one's own position is true or better than those of others. It does however contradict the thought that one's own position is the *only* position

⁴⁸ For this point, see Sachedina (2007) pp. 49-53

supported by good reasons.⁴⁹ Commenting on the consequences of recognizing the burdens of judgment, Rawls explains:

Above all, it does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs. Rather, we are to recognize the practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines, especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences.⁵⁰

The “practical impossibility” of agreeing on the grounds of human rights places moral constraints on how we ought to think about the project of justification. We can certainly argue for our version of the truth and criticize those who disagree, but we have a moral duty to not only respect competing accounts of human rights, but to accept these accounts as *adequate and legitimate*.⁵¹ A world in which every human believes the truth, the whole truth, and nothing but the truth, is simply utopian. So we are not compelled to relativism or skepticism by endorsing the idea that human rights require plural justification. But while we need not endorse these more radical positions, I think we *ought* to maintain a sense of fallibilism in regards to moral knowledge. The account I have presented of plural justification for human rights clearly supports such a conclusion.

Understanding justification as an activity whose success is dependent upon context, and admitting that context is subject to change in ways we cannot foresee, we would be wise to approach our justifications of human rights, and even our commitment to human rights itself, with fallibilist attitudes.⁵² Our recognition of the existence of reasonable comprehensive doctrines that propound justifications of human rights we believe to be false, reminds us that *other people reasonably hold our favored justifications of human rights to be false as well*. To repeat, these facts do not require us to doubt our moral beliefs or our justifications of those beliefs, but merely to acknowledge the fact that there may

⁴⁹ Grimen (1999) p. 122

⁵⁰ Rawls (2005) p. 63

⁵¹ Provided these accounts satisfy certain minimal requirements of logical reasoning.

⁵² See Stout (1993) pp. 219-223 on this point.

come a time when we should revise our current beliefs. Until we are given *good reasons* to engage such a process of revision, we can treat our current justifications of human rights as “true”, or if we prefer, as “the best available”. Simply put, to admit the fallibility of our knowledge is to admit that we are not perfect beings and that we can always improve our moral and political theory.

2.8 Summarizing the argument for plural justification of human rights

The argument thus far has centered itself on two main ideas: 1) the contextual account of justification, and 2) the fact of reasonable disagreement. Jeffrey Stout’s contextual account of justification tells us that both *being justified* in believing something and *the act of justifying* some proposition are dependent upon the epistemic contexts of the persons involved. In particular, the act of justifying has been characterized as *removing the relevant doubts of a particular audience*. Epistemic contexts necessarily vary; people act and reason in accordance with established prior beliefs, moral vocabularies, styles of reasoning and available evidence.⁵³ The consequences of this reality are that different people can be justified in holding contradictory beliefs, and similarly, different people can justify the same belief through mutually exclusive premises. What this serves to illustrate (and really what this all boils down to), is that *truth and justification function independently of one another*. In terms of the justification of human rights, this means that it is certainly possible for a plurality of justifications to exist simultaneously. The question this discussion raises though is whether or not a plurality of justifications is desirable or necessary.

The contextual account of justification leads us to the intuitive point that our justifications for some proposition, will vary according to the audience being addressed. This seems fine for simple, everyday types of propositions, but when human rights is the proposition being justified, we are tempted to call it a special sort of proposition. The preeminence of human rights norms, specifically the fact that they are thought of as *universal* norms, seems to

⁵³ Stout (1993) p. 220

suggest that they represent a special case in which the “audience” involved is indeed *the whole of humanity*, which shares a particular “human context.” Thus, we question whether a plurality of justifications is appropriate for human rights. The idea of reasonable disagreement offers an answer to this question.

The idea of reasonable disagreement explained via Rawls’ burdens of judgment tells us that even under ideal conditions of discourse, people will inevitably come to disagree on the foundations of human rights. This is due to the complexity of the issues involved in formulating some justificatory account for human rights. Such an account will need to address a variety of troublesome concepts: things like human nature, God, reason, goodness, justice, and so on. The limits of the human mind--spelled out partially by the account of the burdens of judgment--prohibit us from being able to freely agree on these points to the point of absolute consensus. To put this conclusion in the language of Jeffrey Stout would be to say that the whole of humanity can never function as the “audience” of any one particular justification of human rights. Thus, plural justification of human rights is necessary.

I recap the core of my argument so far so that it can be extended a bit. The points about the contextuality of justification and the fact of reasonable disagreement are largely an appeal to the reader’s reason. Hopefully the argument has been persuasive. Even if it has, it’s still important to press the importance of plural justification of human rights a bit further. Admitting that people will naturally disagree on the foundations of human rights feels in some ways like a negative or indirect argument for plural justification. We would prefer for everyone to endorse the one true justification of human rights, but since it’s not possible we instead settle for a range of justifications, some of them being necessarily false. What I would like to do now is clarify the moral argument for plural justification, so that we can feel compelled towards it in a way that goes beyond practical necessity. Most of the proceeding points have already been hinted at above, but it will be good to pull them all together and spell out, precisely, the moral argument for plural justification.

2.8.1 The moral argument for plural justification of human rights

This argument is actually quite simple. The idea of reasonable disagreement demonstrates the inevitability of a number of foundational accounts of human rights, but more importantly, it tells us that those accounts will be comprised of *good reasons*. While carrying a number of connotations, the idea of “good reasons” most immediately forbids exclusion of such accounts from the public sphere. The public honoring of *one* reasonable account of human rights out of many can prove to be nothing other than an arbitrary distinction. That our reasonable plurality commands respect is further fleshed out by Article 18 of the UDHR, which proclaims the human right to freedom of thought, conscience, and religion.⁵⁴ But more than anything else, as Lindholm points out, the doctrine of equal and inherent dignity enshrined in the UDHR solidifies this point:

mutual recognition of the equal and inviolable dignity and the inherent freedom of every human being would be pragmatically incoherent, among adherents of differing and more or less rivaling religions or beliefs, if the parties were to shrink from committing themselves to the pursuit of the goal of unforced ‘trans-doctrinal’, cross-cultural, and inter-religious justification of human rights⁵⁵

An account of the foundations of human rights is morally deficient if it fails to recognize the reasonableness and necessity of a plurality of theories. The idea of tolerance is not strong enough to capture the essence of this commitment, as it lacks a certain moral urgency. It’s not just that we ought to tolerate a variety of justificatory accounts; plurality becomes pluralism when we promote such diversity. The equal and inherent dignity of all human beings mandates that people ought to be able, indeed encouraged, to square the idea of human rights with their deeper comprehensive beliefs.

⁵⁴ Lindholm (2008) p. 24

⁵⁵ Lindholm (2008) p. 24

3 Illustrating plural justification: Khaled Abou El Fadl and Islamic grounds for human rights

Even though up to this point the idea of plural justification has been explicated, it will still be important to illustrate this concept in action. I have argued that human rights theory can, and indeed ought to be, characterized by a plurality of justificatory frameworks. But this does not mean that any and all comprehensive doctrines will possess the requisite tools for building such a framework. Some will most certainly not. Worldviews that fundamentally deny the inherent dignity of human beings, and that endorse the degradation and debasement of certain members of society will not be able to endorse human rights, no matter how much we bend and massage them. But for the sake of stability, we should hope (and aim) for as wide an overlapping consensus as possible. People do not like being subjected to laws that they feel are unjustified; (seemingly) arbitrary coercion will most certainly foster resentment and animosity amongst those who feel coerced. Achieving this overlapping consensus will require work however.

Human rights are a young phenomenon, officially only 60 years old if we mark the creation of the UDHR as a birth date. Because many of the world's major religions predate human rights by hundreds, if not thousands of years, we can expect that a certain amount of deconstruction, reconstruction, and reinterpretation will be necessary in order for many traditions to foster substantive internal support for human rights. It is certainly true that many religions and cultures possess indigenous values and norms that are compatible with human rights- liberty, political participation, justice, welfare and so forth. But human rights are more than just abstract values. Human rights doctrine sets out specific substantive claims and entitlements that all human beings are empowered to demand of the state. This entitlement/claim aspect of human rights is *the* new idea, and it is the gap from abstract values to specific rights that needs to be closed by any justificatory scheme.

It will be useful to examine a specific instance of the construction of a religious justification for human rights. It will allow us to seriously engage the opportunities and challenges associated with such an endeavor, thus giving us a better feel for the merits and

demerits of the notion of plural justification. With these aims in mind, I will try to examine the possibilities of Islamic grounds for human rights, with a focus on the work of Khaled Abou El Fadl. The question of the compatibility of Islam and human rights is a popular question as of late, and Abou El Fadl is certainly not the only Muslim scholar to answer in the affirmative. However, it will be useful to focus solely on his work, so that the account we consider is as definite as possible. Contemporary Muslim scholars are generating a wealth of interesting theories regarding the congruity of Islam and human rights, but in surveying a range of these ideas at once, we run the risk of simply highlighting a number of “human rights-friendly” concepts from the Qur’an and failing to construct a systematic and complete theory of justification. Focusing on a single account will put us in a much better position to appraise the structure and outcome of the theory of plural justification. It is important to note of course, that I am not, and do not claim to be an expert in Islamic theology or Shari‘ah (Islamic law).⁵⁶ This however should not detract too much from the value of this section, since my main goal here is exegesis of Abou El Fadl’s major ideas.

3.1 Starting points: moral truths

As a point of departure in his work, Abou El Fadl accepts that moral truth does indeed exist. There is an objective morality that exists apart from human beings’ recognition or acknowledgement of it. This claim is supported by the manner in which values such as goodness, justice, honesty, compassion and mercy are treated in the Qur’an. Humans are called upon to utilize their rational faculties as instruments of recognizing and consummating these moral values.⁵⁷ Furthermore, these moral values are repeatedly

⁵⁶ It is a bit misleading to translate the term Shari‘ah as “Islamic law”, as it actually refers to a range of normative commitments that do not necessarily function in the way that “law” is commonly understood. This point will be clarified as the paper progresses, and so, in the spirit of simplicity I begin here with the popular rendering of Shari‘ah as “law”.

⁵⁷ Abou El Fadl (2004-2005) p. 5. The specific terms used include cognition (fikr), reason (‘aql), and remembrance (dhikr).

connected to the idea of Divinity in a way such that “recognition of Divinity necessitates the recognition of the values that attach themselves to the Divine.”⁵⁸ The manner in which human beings come to know this morality is through Shari‘ah, which translates roughly to “way” or “path.”⁵⁹ In this sense it is the path of God, who embodies objective morality in his perfection. For Abou El Fadl, a proper understanding of the nature of Shari‘ah is essential to the discussion of human rights because of “the central role it plays in Muslim life,”⁶⁰ and also because any “Islamic theory [of human rights] has to be expressed within the framework of Islamic principles.”⁶¹

The two main sources of Shari‘ah are the Qur’an and Sunnah.⁶² The primacy of these sources becomes clear once we consider their relationship to God. The Qur’an is the word of God as revealed to the Prophet Muhammad, and as such it is quite clearly an indication of God’s commandments and pronouncements regarding human activity. The Sunnah can best be conceived as the words, deeds, and consents of the Prophet,⁶³ and are articulated in the Qur’an as being Divinely inspired.⁶⁴ Being Divinely inspired, the Sunnah of the

⁵⁸ Abou El Fadl (2004-2005) p. 5

⁵⁹ More literally, Shari‘ah means the “way” or “path” *to a source of water*.

⁶⁰ Abou El Fadl (2004) p. 30

⁶¹ Abou El Fadl (2004-2005) p. 3

⁶² In Sunni Islam, juristic consensus (ijma‘) and analogical reasoning (qiyas) are widely held to be additional sources of Shari‘ah. Further sources and proofs based in human reasoning and interpretation (ijtihad) are also considered to hold varying degrees of validity across legal schools and between jurists. For the (rather simple) purposes of this paper, I think it will be best right now if the reader focuses on and recognizes the fact that the *primary* sources of Shari‘ah are the Qur’an and Sunnah. Nonetheless, a basic familiarity of the concept of ijtihad and the proofs that spring from it is recommended. For this, see: Kamali (2008) pp. 14-67 & 162-178

⁶³ *Specific* accounts of particular words and deeds are known as Hadith. Conceptualizing the relationship between Hadith and Sunnah can be a bit tricky, as the two seem to often be used interchangeably. But from my understanding, it is best to think of a Hadith as a specific *account* of a saying or action of the Prophet, whereas the Sunnah represents the actual cumulative substance of such accounts.

⁶⁴ Kamali (2008) p. 23. Also see Qur’an 53:3-4

Prophet is meant to set a binding normative example upon Muslims.⁶⁵ So, it will be good to keep in mind that when we talk about Shari‘ah, we are talking about normative obligations that spring primarily from the Qur’an and Sunnah, the authority of which lies in their revelation by God to humanity.

3.2 The epistemology of Shari‘ah

Abou El Fadl stresses that in order to develop a proper conception of human rights in an Islamic context, we will need to set out from an “informed understanding of the epistemology of Shari‘ah.”⁶⁶ An enlightened conception of the relationship between human knowledge and God’s law will help us in our consideration of an immediate dilemma that confronts the intersection of human rights and any theology- the question of the relationship between God and (human) law. In the Islamic context, this dilemma is magnified due to the fact that God has *revealed* the proper way to live, embodied in the directives of the Qur’an and Sunnah. So the question arises, if God is conceived as omniscient and omnipotent, and if he has revealed his law to us, then how can we as people create laws and rights of our own? We can flesh out this dilemma more clearly if we consider the concept of democracy, specifically the *language* of democracy, which is inextricably linked to the idea of human rights.

In a democratic order, we are often fond of saying that “sovereignty belongs to the people,” and that laws should be enacted according to the “will of the people,” and so forth. But these sorts of claims seem to fly in the face of the Muslim’s commitments to the omniscience of God and the perfection of Shari‘ah. If God is all-powerful, then it should be clear to us that *God* is the only sovereign entity and consequently, the only legitimate legislator. Legislation *qua* Shari‘ah occurs in accordance with *God’s* will, rather than the will of the people. Any rights-talk will have to acknowledge that God is the “giver and taker” of rights and that humans possess only those rights provided by Shari‘ah- none more

⁶⁵ Kamali (2008) p. 24. Also see Qur’an 4:80, 59:7

⁶⁶ Abou El Fadl (2003) p. 321

and none less.⁶⁷ So by this account, human rights theory as it pertains to the UDHR and other international human rights documents is rendered largely superfluous. The problem with this approach however, is that its conception of the epistemology of Shari‘ah lacks the “informed understanding” that Abou El Fadl has declared to be so important.

Abou El Fadl does not dispute God’s sovereignty, nor does he dispute the perfection of Shari‘ah. What he does dispute however is the assumption that extracting law from the Qur’an is somehow a simple and straightforward project, such that all other moral and legal discourses (such as human rights) become irrelevant. The Qur’an contains 6,235 verses yet there are only around 350 “legal verses,” most of which articulate “broad and comprehensive principles,” rather than positive rules of law.⁶⁸ The 80 or so verses that can be read to declare specific legal injunctions are not enough to organize a political unit around. What this means is that human beings are going to have to do some interpretive work in order to extract a comprehensive body of law from the Qur’an.⁶⁹ And so, Abou El Fadl emphasizes that Shari‘ah is more than “simply a bunch of *ahkam* (a set of positive rules).”⁷⁰ Indeed, the positive rules are part of it, but Shari‘ah also includes general principles of law and morality, as well as methodologies for extracting and formulating the law.⁷¹ Recognizing that Shari‘ah is much more than explicit legal precepts focuses our attention on the paradox that this Divine ideal necessarily “relies on the interpretive act of the human agent for its production and execution.”⁷²

The intellectual tools for addressing this predicament are nonetheless available to us through classical Islamic discourses. These discourses outlined the distinction between

⁶⁷ Abou El Fadl (2003) p. 318

⁶⁸ Kamali (2008) p. 20

⁶⁹ It should be easy to see that interpretation will also be necessary for extracting law from the Sunnah, simply due to the nature of inductive and deductive reasoning.

⁷⁰ Abou El Fadl (2003) p. 325

⁷¹ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 29

⁷² Abou El Fadl (2003) p. 321

Shari‘ah and *fiqh* (knowledge). Representing the path to God, Shari‘ah personifies a perfection and immutability that is independent of our conception of it. Fiqh however, embodies the very human process of exploring Shari‘ah and providing practical directives on specific situations that Muslims may encounter in everyday life. As an inescapably rational undertaking, fiqh carries with it the very real possibility of error. Abou El Fadl goes on to demonstrate how this distinction between Shari‘ah and fiqh, and particularly the conception of Shari‘ah as an *ideal* only *potentially* realizable through fiqh, lends itself to a sort of fallibilist morality.⁷³

Such an epistemology has contributed to the juristic discourse’s development and articulation of a conceptualization of the *search* for truth and knowledge, which declares this search to be not only virtuous, but also *obligatory*. Abou El Fadl explains that in dealing with the question of moral truth, classical Muslim jurists were hesitant to suggest that Muslims were obliged to find it. A particular hadith attributed to the Prophet stated that “Every mujtahid⁷⁴ is correct” or “Every mujtahid will be [justly] rewarded,” thus indicating that there could be multiple correct answers to the same question.⁷⁵ The implications of such a philosophy have been borne out in the existence of multiple legal schools of thought, all considered equally orthodox.⁷⁶ Thus, on the question of moral truth most Muslim jurists committed themselves to one of two possible answers. The first of which suggested that moral truth would not be revealed until the Final Day, and the other suggesting that God did not intend for human beings to discover particular moral truths (otherwise God would have made the evidence for moral truth decisively clear).⁷⁷ Underlying both of these positions seems to be the idea that absolute moral knowledge is

⁷³ Abou El Fadl (2003) pp. 323-327

⁷⁴ Essentially, a mujtahid is a jurist engaged in formulation of independent judgments regarding Shari‘ah.

⁷⁵ I recount this hadith as quoted in Abou El Fadl (2003) p. 323

⁷⁶ There are currently four schools of jurisprudence in Sunni Islam, all of which lodge equally valid claims of representing Shari‘ah.

⁷⁷ Abou El Fadl (2003) pp.323-325. These groups are known as the mukhatti‘ah, and the musawwibah, respectively.

simply too elusive to consider its attainment to be obligatory on Muslims. For Abou El Fadl, this has profound implications for how we ought to view the relationship between Shari‘ah and the state:

Building upon this intellectual heritage, I would suggest that Shari‘a ought to stand in an Islamic polity as a symbolic construct for the Divine perfection that is unreachable by human effort. [...] Shari‘a as conceived by God is flawless, but as understood by human beings, it is imperfect and contingent. [...] If a legal opinion is adopted and enforced by the state, it cannot be said to be God’s law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer simply a potential – it has become an actual law, applied and enforced. But what has been applied and enforced is not God’s law – it is the state’s law. Effectively, a religious state law is a contradiction in terms.⁷⁸

The actualization of Shari‘ah is simply not possible through the mechanism of state law. Thus, the obligation laid upon Muslims in regards to moral truth, is one of *pursuit* rather than attainment. Shari‘ah takes on the form of a “discursive process that searches for Divine ideals,” and as such, “it is a work in progress that is never complete.”⁷⁹ In this sense, the obligation to strive towards the Divine ideal remains constant throughout the Muslim’s entire lifetime.

As I understand it, the most important point we should take from Abou El Fadl’s account of the epistemology of Shari‘ah, is a point about the fallibility of human interpretations of the Qur’an and Sunnah, and particularly the way those interpretations are implemented into political and legal arrangements. This admission in no way challenges the idea of the perfection of God, nor the conception of God as the only sovereign being. That our interpretations “can be re-thought, deconstructed, and re-developed if need be,”⁸⁰ is crucially linked to the idea that Shari‘ah is more than just a set of positive rules. In fact, the inability to formulate perfect legal injunctions ought to serve to focus Muslims’ attention on the objective moral values presented in the Qur’an. Since the pursuit of Divinity is a

⁷⁸ Abou El Fadl (2003) pp. 325

⁷⁹ Abou El Fadl (2003) p. 325

⁸⁰ Abou El Fadl (2003) p. 327

never-ending affair, and is also *obligatory*, the primary guidance Muslims have been given come in the form of moral norms. The normative values extracted from the Qur'an should inform one's reading of it, and should concur with any specific codes of conduct formulated from it. Insisting on a literalist approach to the Qur'an goes hand in hand with the assumption that humans *can* have perfect access to the Divine Will, and can lead to what Abou El Fadl cleverly characterizes as "the use of Shari'ah to undermine Shari'ah."⁸¹ With these points in mind I will turn now to Abou El Fadl's investigation into the substantive norms prioritized by Shari'ah.

3.3 Core values of Shari'ah

In his appeal to the primacy of what he often refers to as "core values" of the Qur'an, Abou El Fadl speaks of three indispensable values: justice, pluralism, and mercy. He outlines an intricate interplay between these norms in the Qur'anic discourse, which serves to orient the believer in her pursuit of the approximation of the Divine ideal. This interplay, properly understood, can play a key role in the justification of modern-day human rights institutions and safeguards. Before I come to the discussion of these core values, it will be important to spend a few words situating them amidst the relationship between God and man.

3.3.1 The viceregency of man

In the Qur'an, the relationship between God and man is characterized by a Divine trust (khilafah) that positions humans as the viceregents of God on earth.⁸² While it is certainly an honor to represent God on earth, this honor also entails a great deal of responsibility. As God's representatives, human beings take on the burden of realizing the path of God

⁸¹ Abou El Fadl (2004) p. 15. To illustrate his point here, Abou El Fadl mentions the enactment of overly-restrictive laws (such as the ban on female drivers in Saudi Arabia), that result in oppression, even though they are predicated on legitimate norms of Shari'ah (in this case, modesty).

⁸² Kamali (2008) p. 14. Also see Qur'an 2:30, 33:72, 38:26

(Shari‘ah) on earth.⁸³ As has already been discussed, the nature of this Divine path is such that it is unattainable, but nonetheless there exists a *duty* to pursue it. What is important to understand about the notion of man as viceregent is that it is very much the foundation of Abou El Fadl’s political theory. As human beings, the Divine trust we have contracted with God *compels* us to construct a political order that nurtures the values embodied in Shari‘ah. Consequently for Abou El Fadl, any Islamic theory of human rights will necessarily proceed from this premise. Fulfilling human rights becomes a Divine charge.

3.3.2 Justice, pluralism and mercy

Abou El Fadl visualizes justice at the center of the Qur’anic discourse regarding what kinds of duties have been laid upon humans through their appointment as God’s viceregents. He posits the achievement of justice as a “unique human charge and necessity,” owed to God and also to fellow human beings.⁸⁴ But justice is an inherently vague concept, and so saying that human beings have a duty to be just is useless, unless we have a sense of the distinctive characteristics of justice. The project of defining justice forces us to confront the authority of Shari‘ah. As God’s law, Shari‘ah is perfectly just, so if we are trying to define justice then how ought the authority of Shari‘ah bear on that task? As Abou El Fadl puts it plainly, “does the Divine law define justice or does justice define the Divine law?”⁸⁵ His answer to this question is quite clear: justice shall define the Divine law. He rejects the notion that an exploration of justice ought to simply defer to the authority of Divine law, because this perspective entails a largely positivist reading of the Qur’an. In terms of establishing a foundation for human rights, it is necessary to explore the basic elements of justice and the means to attaining it, and then link these ideas to human rights claims. The idea that specific codified rules give us all we need to know about the concept of justice explicitly rejects this analytical process. This points to the heart of Abou El Fadl’s contention that humans should never expect to have perfect access to God’s Will. When

⁸³ Abou El Fadl (2004-2005) p. 2

⁸⁴ Abou El Fadl (2004) pp. 18-19

⁸⁵ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 41

the relationship between Shari‘ah and justice is conceived of in this manner, we run the risk that “the subjectively determined Divine law becomes the embodiment of justice.”⁸⁶ More to the point though, this approach fails because it posits law as prior to morality, and is thus at odds with the task of pursuing the path of God:

Divinity is approached, in my view, through studying the divine moral imperatives, and not the rules of law because morality is prior to law, in the same way that God is prior to anything, including the text, law, or creation. In my view, the primary commitment of a Muslim should be to God, and God’s moral essence, and not to the specific rules of law. Therefore, if there is a conflict between the morality of a legal rule, and our moral conception of God, it is the latter that must take priority.⁸⁷

It is important to note however, that Abou El Fadl is not suggesting that we are free to simply construct any arbitrary notion of justice, and then ascribe to it the status of Divinity. He asserts that in fleshing out the demands of justice, Muslims ought pay heed to the way in which it is presented in the Qur’an, and specifically, the way in which it relates to two other Qur’anic values: pluralism and mercy.

The *fact* of diversity and difference among people is repeatedly affirmed in the Qur’an.⁸⁸ Abou El Fadl contends that rather than being depicted as an unfortunate occurrence, this fact is described as part of the Divine plan. Specifically, it is characterized as a gift from God that serves to illustrate that achieving justice requires human beings to cooperate with each other in a patient and tolerant way.⁸⁹ This message is epitomized in the well-known Qur’anic statement that human beings were created in different “nations and tribes,” so that

⁸⁶ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 41. There is actually a good deal of discussion over the authenticity of this hadith. Since I am only recounting Abou El Fadl’s ideas here, I do not pass judgment on this question.

⁸⁷ Abou El Fadl (2003) p. 358

⁸⁸ Qur’an 5:48, 6:35, 6:108, 11:118, 10:99, 2:256

⁸⁹ Abou El Fadl (2004) p. 20

they would “come to know each other.”⁹⁰ This pluralistic spirit can be better understood if we consider it in relation to the concept of mercy in the Qur’an.

Abou El Fadl locates the centrality of mercy in the Qur’anic discourse in its being identified as a Divine attribute,⁹¹ and also its being used to describe the gift of the Qur’an to humankind.⁹² Importantly, the Prophet was to have linked the ideas of mercy and diversity when he said, “The disagreement of my companions is a mercy.”⁹³ To fully appreciate the significance of the linking of these two concepts, Abou El Fadl stresses that we must have a proper understanding of the Qur’anic conception of mercy. It is by no means simply analogous to some notion of forgiveness:

Rather it is a state in which the individual is able to be just with him or herself and others by giving each individual person his or her due. Fundamentally, mercy is tied to a state of genuine perception of others- which is why in the Qur’an mercy is coupled with the need for human beings to be patient with and tolerant of each other.⁹⁴

Mercy understood as “genuine perception of others” helps us to better understand the idea that diversity is a merciful Divine gift. It compels us to examine our differences and come to appreciate and utilize them in a way that is virtuous and fruitful, in an effort towards genuine understanding of one another. If we return to the connection between justice and diversity--that coming to “know one another” is a command for social cooperation in the pursuit of justice--and if we link this to the concept of mercy that Abou El Fadl presents, then we can begin to see the substance of his theory coalesce. Combined with his assertion that God embodies *objective moral values, which humans have a duty to strive towards*, he concludes:

On this view, then, the *divine mandate for a Muslim polity is to pursue justice by adhering to the need for mercy*. Although coexistence is a basic necessity for

⁹⁰ Qur’an 49:13

⁹¹ Qur’an 6:12, 6:54

⁹² Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 42. Also see Qur’an 21:107, 16:89

⁹³ Abou El Fadl (2004-2005) p. 22. Also see Qur’an 11:118-119

⁹⁴ Abou El Fadl (2004) pp. 21-22

mercy, in order to pursue genuine knowledge of the other and aspire to a state of justice human beings need to cooperate in seeking the good and the beautiful, and do so by engaging in a purposeful moral discourse. Implementing legalistic rules, even if such rules are the product of an interpretation of divine texts, is not sufficient for mercy-genuine perception of the other- or, ultimately, for justice (emphasis added).⁹⁵

So now the stage has been set, so to speak, as I have tried to highlight the major normative values that underlie Abou El Fadl's justification of human rights. But respect for (and even obligations towards) values such as justice and mercy does not necessitate political arrangements centered around human rights. These kinds of ideals are simply too vague and imprecise. Depending on how we conceive of the demands of justice, different people may arrive at varying conclusions about the value of rights. Establishing broad principles like these is helpful no doubt; justice, pluralism and mercy are noteworthy ideals. But the key in any theory of human rights is how the more fundamental principles are linked to specific rights-claims. I will turn now to Abou El Fadl's discussion of rights in Islam, in an attempt at fleshing out, or at least getting us a bit closer to, exactly how he links specific rights institutions to the more general normative values of Shari'ah.

3.4 Rights in Islam

The notion of rights is not a foreign concept in the Islamic juristic discourse, and so in formulating the links between general norms and specific human rights claims, Abou El Fadl takes this discourse as a starting point. It is important to note from the outset that the arabic term *haqq* (pl. *huquq*), which is translated as "right" in english, is often said to connote a variety of meanings including "justice, right as opposed to falsehood, a legal claim, an obligation, something that is proven, and an assigned portion."⁹⁶ A consequence of this ambiguity is that the notion of a right in the Qur'anic discourse takes on a different personality than the modern-day notion of right as individual entitlement. But that the Qur'an and the traditional juristic discourses don't articulate a conception of rights that is

⁹⁵ Abou El Fadl (2004) p. 22

⁹⁶ Kamali (2008) p. 201

instantaneously equivalent to the contemporary notion of rights, shouldn't surprise us. As I have already mentioned the contemporary construction of a right is certainly no more than 400 years old, and in the context of this paper this history is more accurately placed at around 60 years (so as to coincide with the creation of the UDHR). What we should take from the ambiguity of the term *haqq*, and in fact what Abou El Fadl does such a good job of demonstrating, is that it provides a fertile starting ground to explore the concept of human rights in Islam, and further serves to clarify what features of the discourse may need to be reconsidered and reconstructed.

Abou El Fadl explains that rights have traditionally been thought of as belonging to either God or humans, or both. Rights considered exclusive to God relate to matters that are thought to be exclusively commanded *by* God and *for* God. Obvious examples of these sorts of matters include acts of ritual and worship.⁹⁷ Here, we immediately notice the complex connotations of the term *haqq*, which describes the act of daily prayers as God's right (rather than, say, human obligation). Abou El Fadl fleshes out the concept nicely though, when he makes the point that a defining feature of God's rights is that they fall exclusively into God's jurisdiction. Only God can confer punishment for the violation of these rights, and similarly, only God is capable of granting forgiveness of such violations.⁹⁸

Interestingly enough, in the juristic discourse all rights not explicitly claimed by God are said to accrue to human beings. Just as violations of God's rights can only be forgiven by God, violations of people's rights can only be forgiven by people, and specifically only by the *individual* whose rights have been violated.⁹⁹ Abou El Fadl explains that this idea of properly assigning the power to pardon is a defining characteristic of the Islamic rights discourse, and of the notion of *haqq* itself. Muslim jurists have traditionally considered the rights of people "as arising from a legal cause brought about by the suffering of a legal

⁹⁷ Abou El Fadl (2004-2005) p. 16

⁹⁸ Abou El Fadl (2004) p. 25

⁹⁹ Abou El Fadl (2004) p. 25-26

wrong.” Thus, “a person does not possess a right until he or she has been wronged and, as a result, obtains a claim for retribution of compensation.”¹⁰⁰ When we understand rights to be conceived of in this way, we can make better sense of the sort of open-ended idea that all matters not relating to God’s rights are necessarily thought to exist in the realm of people’s rights.

Nonetheless, this idea of rights as claims for retribution has left a distinct mark upon the discussion of rights in Islam. Abou El Fadl laments that despite the extremely broad conception of human rights as all rights not explicitly claimed by God, “the juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than on broad theoretical categories that were perceived as non-justiciable before a court.”¹⁰¹ So, the juristic discussion of “human rights” in Islam has mainly focused on property rights and rights to monetary compensation- the type of rights that can be adjudicated easily. It is important however, to note that this focus is *not* because of the theoretical impossibility of other rights accruing to humans, but instead due to perceptions about what kinds of rights are and aren’t justiciable.¹⁰²

In order to construct sufficient justifications for human rights, Abou El Fadl argues that the notion of rights in Islamic discourses will need to be transformed from one of retributive claims to one of inherent immunities and entitlements that *precede* any legal wrongdoing.¹⁰³ Two questions arise then: 1) How can this be done? and, 2) which specific rights can garner support from the Islamic tradition? The answer to the first question has largely been laid out already, but it will be useful to recount and summarize how all that

¹⁰⁰ Abou El Fadl (2003) p. 336

¹⁰¹ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 51. Ironically, we see contemporary resistance to economic and social rights, on the grounds that these types of rights are not sufficiently justiciable.

¹⁰² Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 51

¹⁰³ Abou El Fadl (2003) p. 336

has been said up to this point specifically informs a notion of rights as individual immunities and entitlements.

3.4.1 Linking Abou El Fadl's ideas to specific rights claims

Abou El Fadl starts from the ontological assumption that objective moral principles and values do indeed exist, and these moral principles are *embodied* by God. This state of embodiment means that *if* human beings are to attempt to understand the essence of God, then at least part of that understanding will necessarily develop via the study and understanding of objective moral virtues. This ontology of God's essence has significance *because of the special relationship between God and human beings*.

This relationship is characterized by a trust that was established between God and humans when humans were appointed the viceregents of God on earth. As deputies of God, humans have accepted the special responsibility of realizing the righteousness of God on earth. But the totality of this righteous path, Shari'ah, is of course *unattainable* by human beings. Nonetheless, there are a number of moral virtues that God has revealed as approximations of his essence. In considering these various virtues, Abou El Fadl stresses the preeminence of justice and mercy, with an added emphasis on how the Qur'anic ethic of pluralism informs our understanding of these two primary values.

Understood properly, these values emphasize the importance of each and every Muslim discharging his or her duties to God. The fulfillment of *every individual's* rights is essential to the idea of a just and merciful society. But the articulation of which rights might be necessary in a just and merciful society is very much directed by the *fact* that Shari'ah is an unrealizable ideal, and that the best Muslims can do is take part in a process of never-ending pursuit of that ideal. This means that a resultant scheme of rights will need to afford protection to individuals' abilities to discharge such an obligation; most notably *human agency* and *autonomy* require protection.

The reason why protection is afforded to *all individuals* rather than some sub-group of individuals (such as representatives of the state or the clerical class) is because *individuals* will be judged by God in the hereafter.¹⁰⁴ Forcing individuals to discharge their obligations towards God is futile as this compromises the integrity of the acts.¹⁰⁵ The Qur'an is quite clear that justice will be meted out by God on an individual basis; no one person can bear responsibility for the acts of another.¹⁰⁶ Furthermore, the divine sanctity of human beings as individuals is celebrated in various Qur'anic verses,¹⁰⁷ and of course, the ideal of mercy as "genuine perception of others," requires that each and every individual possesses their respective rights. Indeed, all of this leads Abou El Fadl to assert that "the notion of individual rights is actually easier to justify in Islam than a collectivist orientation."¹⁰⁸

Under this line of thinking, the idea of rights in Islam becomes much more connected to *an individual's ability to discharge his or her duties to God*. Because these are *constant and perpetual* duties to strive towards the Divine ideal (which itself requires autonomy and agency), the necessary rights needed to protect them must be conceptualized as immunities and entitlements, rather than as retributive or compensatory claims. Hopefully at this point, I have done justice to Abou El Fadl's work, at least in terms of answering the first of the two questions posed above.¹⁰⁹

We've come now to an interesting point in the paper as I will try (or at least I have implied that I will try) to answer the second question, which is concerned with identifying a specific list of rights supported by Abou El Fadl's methodology. I say this is interesting because in fact, as far as I can tell, we won't find a detailed and comprehensive list of rights in Abou El Fadl's writing! This however, does not mean that we have come all this

¹⁰⁴ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 57

¹⁰⁵ Abou El Fadl, *Islam and Democratic Commitment* (2003) p. 57 See also Qur'an 2:256, 10:99-100

¹⁰⁶ See Qur'an 6:164, 17:15, 35:18, 39:7, 53:38

¹⁰⁷ For instance, Qur'an 5:32, 17:70

¹⁰⁸ Abou El Fadl (2004) p. 29

¹⁰⁹ See section 3.4 above

way for naught. Abou El Fadl may not give us a totally complete theory of human rights, but I do believe that he gets us close enough, so that most of the dirty work is already done, so to speak. Importantly, he formulates a political theory that honors human autonomy and agency, and which emphasizes the individual accountability of humans before God. By underlining the fundamentally unrealizable nature of the Divine ideal, he clarifies the proper role of the state vis-à-vis the *promotion* of that ideal. The goal of an Islamic government should be to nurture the *potentialities* of its citizens; to offer them optimal conditions under which individuals can approximate the Divine ideal to the best of their abilities. From this perspective, an Islamic government fails:

unless people are guaranteed the right to rational development. Furthermore, the right to rational development means that people ought to be entitled to minimum standards of well-being, in both the physical and intellectual senses. It is impossible to pursue rational development if one is not fed, housed, educated, and, above all, safe from physical harm or persecution. In addition, people cannot pursue a reflective life unless they are guaranteed freedom of conscience, expression, and assembly with like-minded people.¹¹⁰

So there it is. It's not an explicit call for support of the UDHR, but it certainly gets us in the vicinity. Should we however, be disappointed with anything less than outright endorsement of the Declaration? It's a tricky question. Of course, in some sense we are left wanting more; the critics will perhaps claim that there is vagueness to Abou El Fadl's words that indicate his real intentions of simply paying lip-service to human rights norms.¹¹¹ In my view such a charge bears no merit, however it does help to clarify the point that the idea of plural justification is not simply equivalent to a *modus vivendi*.¹¹² The goal is that all groups express *genuine and sincere* support of human rights. Measuring sincerity is of course not a theoretical matter, but an empirical one; we can best judge the

¹¹⁰ Abou El Fadl (2003) p. 326

¹¹¹ See Pipes (2004)

¹¹² Rawls is adamant about this point. See Rawls (2005) pp. 145-149. A *modus vivendi* represents a situation in which all or some of the parties to an agreement come to that agreement through a state of self-interest. Perhaps the conditions of the agreement are temporarily useful, but when the circumstances change and the self-interested parties can pursue their interests better by breaking the agreement, they will do so.

intentions of others by observing their public behavior and pronouncements on human rights. It would of course make things easier if groups would explicitly endorse the UDHR, but it seems possible that a sense of trust could develop between citizens simply in virtue of some shared public behavior that demonstrates support for human rights. This point about public behavior raises an interesting question regarding the results of competing accounts of human rights. Does plural justification of human rights mandate some shared universal behavior, particularly in the sense of state policies and laws?

3.5 Does plural justification of human rights mandate universal practice?

This is a question about exactly how *thorough* our consensus need be. The identification of norms at a general level is a much different animal than the identification of the specific scope, weight, and practical implications of each particular norm. A rights-based political order will inevitably, and in fact constantly, be forced to balance specific rights against each other. Does the idea of plural justification intimate that we must arrive at consensus on specific judgments in regards to balancing rights? It seems doubtful, although I haven't given this question enough thought to say for sure. Jack Donnelly's ideas on the matter seem intuitive. He classifies human rights norms as existing on three levels: the *concept* of the right, the *interpretation* of that concept, and the *implementation* of a specific interpretation. He claims that consensus is necessary at the general level of concept, permitting rare deviations in our interpretations of the meaning of certain rights, and allowing for a fair amount of variance in our implementation of specific rights in everyday policy.¹¹³ Simply put, he argues that we should be collectively committed to some specific universal set of rights, but this commitment does not bind us all to some universal set of policies and practices. There are different ways to realize the same rights. How sound Donnelly's ideas are, is of course a topic for another day, but nonetheless a matter that must be taken up. In some sense, these questions may be more important than the ones I have addressed in this paper, as these seem to be more closely related to matters of

¹¹³ See Donnelly (2003) pp. 94-98 & Donnelly (2007) pp. 298-306

everyday policy, which certainly bears an immediate impact on the realization or obstruction of human rights around the world.

Before I conclude, I would like to quickly return to Abou El Fadl, and make two comments about the project of Islamic justification of human rights. Unfortunately, because of space constraints, I can only treat these points in a cursory manner.

3.6 Dignity and justifying human rights

It is important to recall the idea that the UDHR contains the elementary premise of the inherent and equal dignity of human beings. It was said that while various normative traditions are free to articulate their own “homegrown” justifications for human rights, it seems necessary that each tradition will need to engage the dignity doctrine in some way or another.

Interestingly enough, in recounting Abou El Fadl’s justifications for human rights, I have not mentioned the word dignity even once. I think, or I suppose I hope, that my avoidance of the notion of dignity has been a fair move, in terms of depicting Abou El Fadl’s ideas. I certainly don’t think that he has no interest in the idea of dignity and how it relates to human rights. But it’s clear that there are other concepts and ideas that he views to be more urgent to the project of justifying human rights within an Islamic framework. Abou El Fadl’s theory is very much centered around the idea that human beings hold certain duties towards God.¹¹⁴ Rights are necessary to help facilitate and ensure that humans are able to discharge these duties. There are of course other key concepts involved--justice, mercy, and pluralism, to name a few--but the interesting point is that the idea of dignity does not seem to play a primary role. The Qur’anic verse that explicitly announces the dignity of all

¹¹⁴ Interestingly, John Locke, often considered as a sort of “founding-father” of modern rights, also used human obligations to God as grounds for rights.

human beings is only mentioned by Abou El Fadl *once* in the writings I reviewed, and it is in somewhat of a passing fashion.¹¹⁵

I must repeat, I do not claim that Abou El Fadl neglects or fails to *value* the notion of dignity; I am inclined to say he does the opposite. Rather, I simply point out that his writings seem to focus on a number of other ideas, suggesting that these other ideas hold a certain priority. Is this a possible weakness? It's hard to say. In order to ascertain whether or not some specific theory of human rights addresses the notion of dignity adequately, we need to first hold a fairly well thought-out conception of dignity itself. What exactly does dignity mean in the first place? What does it entail? How much consensus must there be on this meaning? Perhaps Abou El Fadl has addressed the idea of dignity *implicitly* in his writing, in some way addressing certain constitutive elements of dignity. I haven't thought about this enough to offer any ideas. But I think it raises an important question on a general level: How much of a role must the idea of dignity play in a justification of human rights?

3.7 Plural justification and cultural essentialization

Plural justification of human rights does not require us to essentialize or over-simplify our understanding of particular religions and traditions, nor the people belonging to them. I think Abou El Fadl presents a good theory of human rights. But I don't claim that if a Muslim wants to support human rights, then she *must* adhere to Abou El Fadl's ideas. Perhaps there are better Islamic grounds for human rights that piece together a different understanding of the relationship between Shari'ah, theology, and rights. This of course, is a matter for Muslims to work out.

Furthermore, Muslims are free to support human rights from "secular" grounds if they want, perhaps for example, some type of Kantian or utilitarian grounds. By supporting an

¹¹⁵ The Qur'anic verse I refer to is sura 17 verse 70. For the reference I refer to in Abou El Fadl's work see: Abou El Fadl (2007) p. 183.

account of human rights that emphasizes the priority of Shari‘ah in Muslim life, I don’t pass any judgment on whether or not this prioritization is necessary for *all* Muslims. There exists strong opposition to the idea that Muslim support for human rights need be grounded in Shari‘ah.¹¹⁶ Proponents of this position view the West’s adoption of human rights, specifically Protestantism, as a model that should be emulated by the Islamic tradition. This model requires the secularization of the public sphere in a way that reformulates religion as a strictly private matter. Thus, Shari‘ah has no place in public life, and is unnecessary towards the project of justifying human rights.

This depiction of the secular Muslim position is crude and incomplete, but I will just say this: Whether or not a process of secularization (whatever that means) is important to building support for human rights in Muslim countries is beside the point. Work by scholars such as Abou El Fadl who try to locate religious grounds for human rights is both important and *necessary* to the adequate justification of human rights. This is because of the general commitment of human rights to the inherent and equal dignity of all human beings, and the specific human rights commitment to freedom of religion and belief. Perhaps some Muslims are comfortable supporting human rights on secular grounds, but the question is, are all? As long as there remain Muslims who choose not to overlook the priority of Shari‘ah, then our respect for their dignity and freedom of belief mandates that we embrace Shari‘ah-oriented justifications for human rights. Theories of human rights should be judged according to *how well* they justify rights, not *how* they justify rights.

¹¹⁶ See for example: Chase (2006) & Afshari (1994)

4 Final Remarks

In this thesis I have tried to confront some of the questions that arise when we consider the possibility of justifying universal moral and political norms, such as human rights, in a permanently plural world. I have *not* tried to spell out some specific substantive grounds of human rights that I find to be “true.” Instead, I have tried to partly describe the conditions under which our justifications of human rights will be most adequate. I have endorsed the idea that these conditions require a plurality of competing, and perhaps even mutually exclusive justificatory schemes.

The moral force of this claim has been located in the ethos of human rights, particularly the general commitment to the equal and inherent dignity of all human beings, and the more specific commitment to freedom of religion or belief. The reader has also been reminded of the inherent receptiveness of the UDHR to the idea of plural justification of human rights.

The two major theoretical tools I have tried to employ in explaining why plural justification of human rights is necessary, are Jeffrey Stout’s “contextual account of justification,” and John Rawls’ explanation of reasonable disagreement via the “burdens of judgment.” Stout’s ideas help to clarify the process of justification, in particular, what we aim to do when we justify something, and how those aims can be achieved in a way that is considered to be successful. His idea that particular justifications are aimed towards specific audiences is of key importance. That we disagree on the answers to any number of fundamental metaphysical questions demonstrates the fact that in many cases, all human beings cannot be considered to be part of the same “audience,” in Stout’s use of the term.

The idea of *reasonable* disagreement lends moral legitimacy to the existence of multiple audiences in relation to the justification of human rights. Further, Rawls’ articulation of the burdens of judgment (or something like it) offers the best way to understand our systemic disagreement, as it explains this disagreement in a way that is conducive to fostering mutual respect of disagreement among citizens. Mutual respect of disagreement

is crucially important to the idea of plural justification of human rights. This is because, once we recognize the reasonableness of certain competing justifications of human rights, we cannot insist on the exclusion of one or more of these justifications from the public sphere. To insist on such exclusion would be arbitrary and unjust.

After establishing this core argument, I tried to clear up some misgivings the reader may have felt towards the idea of plural justification. It was pointed out that the popular conception of tolerance was not suitable as a substitute for plural justification. As opposed to the apathy of tolerance, the thesis claims that our justification of human rights is not fully adequate without the acceptance and *promotion* of a plurality of foundational schemes. Recognizing the inherent and equal dignity of each other and the reasonableness of our reasons for asserting that dignity, does not entail simply “putting up” with one another’s ideas. It is not simply about tolerating other people’s “mistaken” accounts of human rights, but instead, promoting principled support for human rights across our normative divides.

Of course, recognizing that others hold good reasons for supporting human rights—good reasons that we coincidentally, might reject as false—does not propel us towards some distorted conception of truth. We need not hold all competing accounts to be simultaneously true, nor must we accept that none of them are true. We may not however, insist that we *alone* hold good reasons for supporting human rights.

After describing and arguing for the idea of plural justification of human rights in the first half of the paper, I then turned to the work of Khaled Abou El Fadl in the second half. I won’t recount his ideas here, but rather just offer some concluding remarks on the value of his work.

What Abou El Fadl’s work demonstrates first and foremost, I think, is that there exist fertile grounds within the Islamic tradition for developing principled support for human rights. Although I haven’t looked into the matter yet in an adequate way, I suspect that all

of the major world religions possess similar receptibility to the idea of human rights. Crucial to my optimism is the fact that human rights is surely *not* in Rawlsian terms, an example of a comprehensive doctrine. There are many important moral and political questions, perhaps even the most important questions, that are left untreated by the idea of human rights. Perhaps building a philosophy of human rights will require a bit more work in some traditions than in others, but it seems likely that in only rare instances will it require the wholesale expungement of prior beliefs. I think this is an important point.

It is easy for proponents and theorists of human rights and perhaps even more so everyday people in the West, to view the emergence of human rights as a collective act of casting away primitive and antiquated beliefs, in favor of the more evolved doctrine of human rights. But I think this is an inadequate understanding of the history of human rights. Locke's motivation for endorsing rights was similar to Abou El Fadl's; rights are necessary in order to carry out our obligations to God. In time, the mainstream conception of rights in the West certainly became secularized, but it is interesting to ask the question, "How *much* secularization is needed for the realization of human rights?"¹¹⁷ Answering such a question could be, and I am sure has been, the topic of another paper. I do not have such space here so I will just say this: In the face of authentic and reasonable religious grounds for human rights, theorists may need to rethink the *extent* of secularization that is required for human rights to be upheld in some modern-day society. Calls for the public filtering or translation of religious motivations into some "neutral" moral language seem unnecessary and in fact, unjust.¹¹⁸ Religious people shouldn't have to bisect their lives according to some imaginary public/private divide. Simply put, I don't think that endorsing human rights is simply a matter of shedding an old, worn tradition in favor of some newer, more appropriate worldview. Recognizing that the West's history of coming to terms with human rights was as much a process of reinterpretation and revision as Abou El Fadl's

¹¹⁷ See Freeman (2004) pp. 389-391 on the secularization of rights theory.

¹¹⁸ For example see Habermas (2005), or Rawls (2005) pp. 440-490

ideas represent to the Islamic tradition, could go a long way in making the idea of plural justification appear much more common-sensical.

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